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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Sections 11 )  
and 13 of the Cable Television )  
Consumer Protection and ) MM Docket No. 92-264  
Competition Act of 1992 )  
 )  
Horizontal and Vertical Ownership )  
Limits, Cross-Ownership Limitations )  
and Anti-Trafficking Provisions )

To: The Commission

**REPLY COMMENTS OF**  
**OKLAHOMA WESTERN TELEPHONE COMPANY**

Oklahoma Western Telephone Company ("Oklahoma Western"), by its attorneys and pursuant to the Commission's Notice of Proposed Rule Making and Notice of Inquiry ("Notice"),<sup>1/</sup> hereby respectfully submits its Reply Comments in response to the Comments of Cablevision of Texas III, L.P. ("Cablevision") filed on February 9, 1993, in the above-captioned proceeding.

In these Reply Comments, Oklahoma Western takes issue with a number of counter-proposals advanced by Cablevision and supports the Commission's proposal to adopt its recently promulgated rules concerning cable/MMDS cross-ownership to implement the cable/MMDS cross-ownership prohibitions of Section 11(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").<sup>2/</sup>

**I. INTRODUCTION**

In its Comments, Cablevision -- the monopoly provider of cable television service in Clayton, Oklahoma -- urges the Commission to narrowly construe the

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<sup>1/</sup> FCC 92-542, released December 28, 1992, reprinted in 58 Fed. Reg. 3523 (Jan. 11, 1993).

<sup>2/</sup> Pub. L. No. 102-385, 106 Stat. 1460, 1486-87 (1992).

exceptions to the cable/MMDS cross-ownership prohibitions of the 1992 Cable Act. Cablevision Comments at 3. In this regard, it argues that the Commission should "revise its current MMDS cross-ownership rules so as to prohibit all co-ownership of MMDS and cable television facilities in the same franchise area unless that combination was in existence and fully operational on or before [the effective date of the 1992 Cable Act]." Id. at 6 (emphasis added). It further defines "fully operational" systems as MMDS systems "providing at least four channels of MMDS service" and as cable systems "providing service to customers." Id. at 5. As shown below, such a revision of the Commission's Rules would be contrary to the well-considered public interest basis upon which those rules and the 1992 Cable Act rest.

At the outset, it should be noted that Cablevision has an unstated motive for filing comments in this proceeding: it is a party to litigation pending before both the Commission and the U.S. Court of Appeals for the Tenth Circuit, in which the very issues it raises here could well be determinative.<sup>3/</sup> In both cases, Cablevision asserts that the 1992 Cable Act's cable/MMDS cross-ownership prohibition forbids Oklahoma Western from providing competing cable service in the Clayton, Oklahoma area, arguing that because Oklahoma Western provides MMDS service in that rural area,<sup>4/</sup> it may not also operate a cable system. It does so despite the fact that Oklahoma

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<sup>3/</sup> See Motion to Dismiss, filed by Cablevision on November 25, 1992, In re Application of Oklahoma Western Telephone Company, File No. W-P-C-6614; Cablevision of Texas III, L.P. v. Oklahoma Western Telephone Company, et al., Case No. 92-7115 (10th Cir.).

<sup>4/</sup> On March 12, 1990, Oklahoma Western was granted an FCC license to provide MMDS to subscribers in the Clayton, Oklahoma area on a non-common carrier basis. See File No. 50144-CM-L-90 (Station WLK 382).

Western was granted its MMDS licenses, its local cable franchise,<sup>5/</sup> and its Section 214 authorization for cable service prior to the enactment of the 1992 Cable Act.<sup>6/</sup>

Cablevision bases its claims before the Commission and the Tenth Circuit on the fact that Oklahoma Western is not yet providing cable service to subscribers. Therefore, according to Cablevision, Oklahoma Western's cable operation is not eligible for grandfathering under Section 11 of the 1992 Cable Act. However, the sole reason Oklahoma Western has not initiated cable service pursuant to its FCC authorization is the seemingly never-ending efforts of Cablevision to impede the introduction of that service.<sup>7/</sup> Now, after over two years of delay, and having failed in numerous attempts before the Commission to thwart the introduction of competing cable service by Oklahoma Western, Cablevision is once again before the Commission -- under the pretext of its "Comments" -- in yet another effort to do so. This time, however, it has sought the Commission's assistance without even advising the Commission -- the ultimate decision-maker in the restricted proceeding between Oklahoma Western and Cablevision -- of its underlying interest in this issue and without serving Oklahoma Western with its "Comments" on that issue.

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<sup>5/</sup> On August 14, 1989, the town of Clayton, Oklahoma granted Oklahoma Western's affiliate, Star Search Rural Television Company of Clayton, Oklahoma, a certificate to provide competitive cable service to the town.

<sup>6/</sup> On August 5, 1992, the FCC's Domestic Facilities Division, acting pursuant to delegated authority, released its Authorization Order granting Oklahoma Western authority to construct and operate its proposed cable system, effective July 24, 1992. Memorandum Opinion and Order, File No. W-P-C-6614, released August 5, 1992 ("Authorization Order").

<sup>7/</sup> Cablevision filed with the Commission a Petition to Deny the Oklahoma Western 214 application. Following FCC grant of that application, Cablevision filed an Application for Review and a Request for Stay of the FCC's Authorization Order and a procedurally infirm Motion to Dismiss Oklahoma Western's 214 authorization. Cablevision also filed a complaint in the U.S. District Court for the Eastern District of Oklahoma where it obtained an injunction against Oklahoma Western's construction of a cable system until the FCC acted on the 214 application. After the FCC granted that application, Cablevision opposed dissolution of the injunction claiming the FCC order was not a "final" order. Since the District Court refused (without explanation) to dissolve its injunction, Oklahoma Western has sought review of that refusal in the U.S. Court of Appeals for the Tenth Circuit.

## **II. THE COMMISSION SHOULD ADOPT ITS WIRELESS CABLE RULES TO IMPLEMENT SECTION 11 OF THE 1992 CABLE ACT**

Subject to two significant exceptions, Section 11(a) of the 1992 Cable Act prohibits a cable operator from holding an MMDS license in its franchise area. The new legislation provides:

It shall be unlawful for a cable operator to hold a license for multichannel multipoint distribution service, or to offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system. The Commission--

- (A) shall waive the requirements of this paragraph for all existing multichannel multipoint distribution services and satellite master antenna television services which are owned by a cable operator on the date of enactment of this paragraph; and
- (B) may waive the requirements of this paragraph to the extent the Commission determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming.<sup>8/</sup>

The Commission is proposing to implement Section 11(a) by adopting the cable/MMDS cross-ownership rules promulgated in its "recently concluded rulemaking initiated to facilitate the provision of 'wireless cable' service to the public." Notice at ¶ 19.<sup>9/</sup> Those rules provide for (1) a rural exemption from the cross-ownership ban and (2) the grandfathering of "cross-ownership interests" that existed on the effective date of the rules, both of which provisions would be

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<sup>8/</sup> Section 11(a) amends Section 613(a) of the Communications Act of 1934, 47 U.S.C. § 533(a), by adding a new paragraph "(a)(2)". Contrary to Cablevision's observation (at 2), by its terms, the statute appears to prohibit only the granting of an MMDS license to a cable company, not the grant of a Section 214 application seeking authority to provide cable service filed by an MMDS operator. This is consistent with the Commission's current cable/MMDS cross-ownership ban which appears in the section of the Commission's Rules concerning eligibility for MMDS licenses, not cable authorizations. See 47 C.F.R. § 21.912.

<sup>9/</sup> See Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, Report and Order, 5 FCC Rcd 6410 (1990), Second Report and Order, 6 FCC Rcd 6792 (1991) ("Wireless Cable").

maintained in force under the Commission's proposal in this proceeding. Id. at ¶¶ 19-20.

In 1990 the Commission adopted its rules prohibiting cable television companies from holding MMDS licenses. The Commission's cable/MMDS cross-ownership rule (47 C.F.R. § 21.912(a)), like Section 11(a) of the 1992 Cable Act, prohibits the granting of MMDS licenses to cable companies in their franchise areas. However, those rules do permit the ownership of an MMDS system by a cable company if there is another independently owned and operated cable system operating in a substantial portion of the protected service area of the MMDS system.<sup>10/</sup> 5 FCC Rcd at 6417. In 1991 the Commission adopted additional rules providing for a rural exemption to the cable/MMDS prohibition and the grandfathering of existing MMDS and cable interests. 6 FCC Rcd at 6800.

The considerations upon which the Commission's Wireless Cable decisions were based parallel Congress' concerns underlying Section 11(a). As Cablevision correctly notes, Section 11 was designed to "prevent the warehousing of frequencies." Cablevision Comments at 4. The Commission, in the Wireless Cable proceeding -- as did Congress in its deliberations resulting in the new cable/MMDS cross-ownership provisions -- emphasized that the ownership of an MMDS system by a cable company could result in anticompetitive "warehousing" by the cable-controlled MMDS system. Wireless Cable, 6 FCC Rcd at 6800. Because the considerations underlying the FCC's Rules and the 1992 Cable Act's cable/MMDS provisions are identical, it is not surprising that the Commission concluded that its Rules could effectively implement the Act's provisions. As the Commission correctly recognizes, its current rules address exactly the same concerns as those addressed by the 1992 Cable Act:

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<sup>10/</sup> See 47 C.F.R. § 21.912(a). The Notice does not specifically reference this exemption as one that the Commission intends to maintain pursuant to its authority under the 1992 Cable Act. Oklahoma Western urges the Commission to reiterate that this exemption to the cable/MMDS cross-ownership ban also will remain in force.

[T]hese recently adopted rules are consistent with and effectively implement the cross-ownership prohibitions of the 1992 Cable Act as regards the MMDS service and the same rules and their implementing criteria are appropriate for the cross-ownership prohibitions as they relate to SMATV.

Notice at ¶ 20. In sum, the Wireless Cable proceedings demonstrate that, in a situation virtually identical to that at issue in this proceeding, the Commission found it in the public interest to exempt or grandfather certain cable/MMDS cross-ownership combinations from its prohibition.

In particular, in adopting its "grandfathering" provisions, the Commission concluded that:

Existing cable/wireless cable operations and contracts will be grandfathered. . . . We will also grandfather cable applications for MDS channels filed before . . . the date the initial Notice of Proposed Rulemaking and Notice of Inquiry in this proceeding was adopted . . . . After that date, the parties had notice that a cross-ownership restriction could be adopted and that divestiture could be required, so the same equitable arguments are not applicable.

6 FCC Rcd at 6800 (emphasis added).

As noted by the Commission in the Wireless Cable decision, grandfathering provisions generally are provided for equitable reasons so that existing interests need not be divested as a result of unexpected structural changes mandated by the government. Id. By grandfathering pending MMDS applications and cable/wireless contracts the Commission accorded proper weight to actions taken in reliance on the previously existing rules.

Despite these strong grounds for grandfathering a variety of existing cable/MMDS "interests" (e.g., MMDS operations with less than four channels; cable companies with authorizations but not yet in service) as the Commission proposes, Cablevision urges the Commission "to make explicit that the exemption contained in Section 613(a)(2)(A) for 'all existing multi-channel, multipoint services which are owned by a cable operator on the date of enactment of this paragraph' only applies to those situations where both the cable system and the MMDS facility were in existence

and operating on October 5, 1992." Cablevision Comments at 4-5 (emphasis in original). As noted above, Cablevision also would have the Commission conclude that the only MMDS systems entitled to grandfathering are those which had a minimum of four channels of MMDS service, and the only cable systems are those which were providing service to customers, on October 5, 1992. Cablevision's narrow reading of the statutory exemptions and the Commission's power to implement those exemptions should be rejected.

In the Wireless Cable proceeding, the Commission recognized that the grandfathering of existing cable/MMDS interests -- whether or not they were "fully operational" -- was warranted where companies have expended considerable money, effort and time in applying for and obtaining the newly-prohibited ownership interests and in reliance upon the previously existing rules. 6 FCC Rcd at 6800. As the Commission correctly concluded, where the affected parties had no notice that a prohibition was to be adopted prior to making their investments, the public interest would be ill-served by a forced divestiture. Id.

This was the decision that the Commission reached not only with respect to "fully operational" MMDS and cable systems in its Wireless Cable rulemaking, but also with respect to pending MMDS applications as well as "existing cable/wireless cable operations and contracts." 6 FCC Rcd at 6800. And, as the Commission observed, Section 11(a) of the 1992 Cable Act similarly "provides for the grandfathering of existing cross-ownership situations that existed on October 5, 1992 [the 1992 Cable Act enactment date]." Notice at ¶ 21. For the same equitable and public interest reasons that resulted in the Commission's current grandfathering provisions, the Commission should exercise the authority granted it by Congress to grandfather the same types of cable and MMDS interests which existed on the Act's enactment date. Accordingly, consistent with these equitable considerations, any MMDS system existing before the enactment of the 1992 Cable Act should be

grandfathered by the Commission's Rules regardless of how many channels of service it was providing on that date. Similarly, grandfathered cable interests should include those cable entities which had obtained all requisite state, local and federal authority to provide cable service by October 5, 1992, regardless of whether they were providing service to subscribers on that date.

Contrary to Cablevision's suggestion (at 4), such an action would not be inconsistent with the intent of Congress. As Cablevision correctly notes "Section 11 of the 1992 Cable Act was adopted well after the adoption of the Commission's MMDS cable cross-ownership rules." Cablevision Comments at 4. Accordingly, Congress must be deemed to have been aware of -- and approved -- the FCC's cable/MMDS cross-ownership rules when it enacted the 1992 Cable Act's provisions addressing the same subject. Cf. Kay v. FCC, 443 F.2d 638 (D.C. Cir. 1970) (legislation amending a particular statutory provision without changing FCC interpretation of other related provisions indicates Congressional acquiescence in FCC position). Since Congress did not specifically overturn the Commission's rules, the Commission may exercise its waiver authority under the 1992 Cable Act by considering MMDS and cable entities which had all of the requisite authorizations as of the effective date of the new prohibitions as subject to grandfathering even in the absence of "full service" to subscribers on the Act's effective date.

Retention of the rural exemption in the Commission's wireless cable rules also is consistent with the 1992 Cable Act. Section 11(c) of the Act directs the Commission to ensure that its rules "not impose limitations which would bar cable operators from serving previously unserved rural areas." And Section 11(a)(2)(B) of the Act provides that the Commission "may waive the requirements of this paragraph to the extent [it] determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming." According to the legislative history, that provision "gives the FCC the authority to grant waivers of the provision

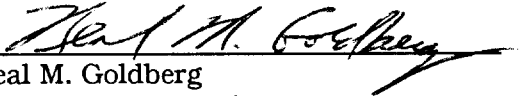


where it is necessary to ensure that residents in the cable community receive the cable operator's programming."<sup>11/</sup> Given the substantial costs of providing direct cable service to sparsely populated rural areas, in order for some residents in those areas to receive "cable" programming they must receive it via MMDS -- a radio-based service -- or not at all. For this reason, the Commission's existing rural exemption -- which is based on the same underlying premises as the Cable Act's exemption -- finds support in the 1992 Cable Act.

### **CONCLUSION**

For the reasons stated above, Oklahoma Western supports the Commission's proposal to implement Section 11(a) of the 1992 Cable Act by means of its recently promulgated cable/MMDS cross-ownership rules. Specifically, the Commission should maintain in force its rules with respect to: (1) grandfathering existing cable and MMDS interests regardless of their operational status as of October 5, 1992; (2) the rural exemption from the cross-ownership ban; and (3) the exemption premised upon the existence of another independently owned and operated cable system in the service area.

Respectfully submitted,

  
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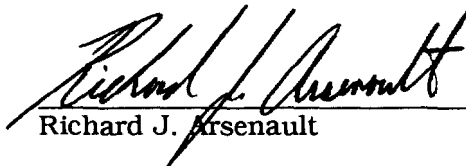
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<sup>11/</sup> H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 81 (1992), reprinted in 1992 U.S.C.C.A.N. 1231, 1263.

CERTIFICATE OF SERVICE

I, Richard J. Arsenault, certify that I have this 3rd day of March 1993, sent by first-class U.S. mail, postage prepaid, a copy of the foregoing comments to:

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